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IN THE

Supreme Court of the United States

October Term, 1966

No. 670

JOHN LESTER ELLENBURG and
BEN EDELSTEIN,

Petitioners

vs.

THE STATE OF GEORGIA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Solicitor General
Atlanta Judicial Circuit

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Respondent prays that the petition for writ of certiorari be denied, giving reasons herein for this position.

OPINION BELOW

The published Opinion of the Court of Appeals of Georgia is found in 113 Ga. App. 585. However, the published opinion is not the entire Opinion in the following respect: The published opinion is that which was announced by the Court of Appeals of Georgia on April 18, 1966, in announcing its affirmance of the case. Thereafter a motion for rehearing was filed by Appel-

lant, and this motion was denied on May 4, 1966, with an additional nine-line statement or opinion by the Court of Appeals. This additional Opinion was marked by the Court "Not to be Published," under authority of an Act of the Legislature of Georgia (Ga. Laws 1966, page 500) amending Ga. Code section §6-1606, which law allows the Georgia appellate courts to reduce to some extent the vast quantity of printed matter adding to the book shelf requirements of law libraries from year to year. A certified copy of the said additional Opinion on Motion for Rehearing is being filed with the United States Supreme Court, at the time of filing this brief, under authority of Rule 21 (6), Supreme Court Rules. The additional opinion is as follows:

ADDITIONAL OPINION

"41701 ELLENBURG v. THE STATE

ON MOTION FOR REHEARING

(Not to be published)

"On motion for rehearing, the appellants now seek to raise questions in addition to that which they argued on the appeal and which the Court answered in the opinion.

"On page 4 of appellants' original brief, they state: 'The appellants in this case are content to base their case in this Court on the one main proposition contended all throughout the trial of the case in the Criminal Court and in the Superior Court on certiorari, to-wit: THAT IT WAS ISSUED FOR ARTICLES NOT PROVIDED FOR BY STATE STATUTE.'"

JURISDICTION

Jurisdiction has been invoked by the petitioner under the provisions of 28 U.S.C.A. sec. 1257 (3). Jurisdiction is doubted by respondent on the ground that there is no substantial Federal question presented for review, in fact no Federal question at all seems to be presented for review, in view of the limitation of the issue and decision in the Georgia appellate courts, as pointed out by the above additional Opinion. Cf. Rule 19 (1) (a), United States Supreme Court.

QUESTION PRESENTED

In a criminal conviction for operating a gaming house and soliciting bets on football games, in which the prosecution introduced documentary evidence seized under a search warrant which was objected to on the ground that the search warrant was void, and when the defendant appealed to the state appellate court and based his appeal upon the sole ground that the search warrant "issued for articles not provided for by state statute," and the state appellate court ruled upon that one question alone, can a petitioner for certiorari in the United States Supreme Court raise additional questions of Federal constitutional law which were not decided by the state appellate courts?

ARGUMENT

1. The Writ of Certiorari Should Not Be Granted, As the Only Question Decided by the Georgia Appellate Courts Was Whether or Not the Search Warrant Issued for Articles Not Provided for by Georgia Law.

The appeal was limited to that question because the Appellant based his appeal upon that sole ground, as stated in Appellant's brief and argument quoted in the additional opinion of the Court of Appeals of Georgia on the motion for rehearing.

In his petition for certiorari petitioner contends that there were some other legal points or questions in the case. Some of these we have been unable to locate in the state court record of the trial. But whether the other points were presented in the trial court in legal objections or not, they were all out of the case when the appeal was presented to the Court of Appeals of Georgia for decision on one point only, the appellants declaring:

> "The appellants in this case are content to base their case in this Court on the one main proposition contended all throughout the trial of the case in the Criminal Court and in the Superior Court on certiorari, to-wit: THAT IT WAS ISSUED FOR ARTICLES NOT PROVIDED FOR BY STATE STATUTE."

On this question the Court of Appeals of Georgia held that Georgia had adopted "the common law of England, and such of the statute laws as were usually in force before the Revolution . . . " And they held that under the common law search warrants could lawfully issue for such things as stolen or forfeited property, burglar's tools and weapons, implements of gambling, and many other things of like character, citing in support of that finding a United States Supreme Court decision, *Gouled* v. *United States,* 255 U.S. 298, 308, 41 S. Ct. 261. The fact that the Georgia appellate court cited the United States Supreme Court decision on the question did not convert it into a Federal question. It was still a state question —

whether the Georgia law authorized search warrants to issue for such articles as the present search warrant issued for.

Annotated under Rule 19, Supreme Court Rules, in TITLE 28, Supp., we note the case of *Ellis* v. *Dixon,* 349 U.S. 458, 75 S. Ct. 850, annotated under the key subhead: "8.—Questions not raised below." In that case the United States Supreme Court dismissed the certiorari "on the ground that we lack jurisdiction" (Page 464), the basis for the ruling being that the constitutional question which petitioners sought to carry up by their certiorari did not appear to have been ruled upon by the state appellate court. The *Dixon* decision also points out: "This Court has often refused to decide constitutional questions on an inadequate record." (Page 464)

In *Phyle* v. *Duffy,* 334 U.S. 431, 68 S. Ct. 1131 (1948), the Supreme Court held that certiorari does not lie to determine whether state procedure deprives one of due process if petitioner has not invoked proper state remedy to have such matter determined. The closing language of the opinion said:

> "In this situation we find no federal constitutional question presented which is ripe for decision here. So here, as in *Woods* v. *Nierstheimer,* supra (328 U.S. 211) being unable to say that the judgment denying habeas corpus may not rest on an adequate non-federal ground, the writ of certiorari is Dismissed."

So in the present case, if the defendant Ellenburg had any basis in the trial court record for contending that his constitutional rights were violated by admitting in evidence the search warrant, he *abandoned that contention*

in the Court of Appeals of Georgia, invoking that court's decision on the non-federal ground that the search warrant issued for articles not provided by state statute, which question the Georgia appellate courts have now decided adverse to him. In this situation "there is no federal constitutional question presented which is ripe for decision here."

In *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Com.*, 297 U.S. 471 (1), 56 S. Ct. 536 (1936), a ruling on this subject was summarized as follows in the first headnote:

> "The record failing to disclose what, if any, federal questions were presented to the state supreme court, review here is accordingly confined to those which are discussed in the opinion of that court."

In *Wilson* v. *Cook*, 327 U.S. 474, 66 S. Ct. 663, an appeal from and writ of certiorari to the Supreme Court of Arkansas, involving an alleged invalidity of a certain tax, the Court said: (P. 483)

> "But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it."

And the *Wilson* v. *Cook* decision, P. 484, also said, quoting from *Peo. of State of N. Y.* v. *Graves*, 300 U.S. 308, 317, 57 S. Ct. 466:

> "In reviewing the judgment of a State court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the consti-

tution with respect to which other questions are properly presented."

2. Applicant's Other Questions, Which Were Not Ruled Upon In State Court, Present No Substantial Federal Question.

In addition to the question presented to the Georgia Court of Appeals and there decided, the applicant for certiorari now asks the United States Supreme Court to take up several other questions which were not decided by the Georgia appellate courts.

While it would seem that these "other questions" are not properly up for consideration now, we wish to point out, however, that no substantial federal question is involved in them, and they do not present any sufficient reason for reversing the judgment.

The petition contends that this Court should decide whether the search warrant in this case gave sufficient description of the things to be searched for. The affidavit in the instant case, on which the search warrant was issued, describes the property to be searched for as "records of bets, names or symbols of bettors, amounts bet, amounts of money 'laid off' with other professional bookmakers, financial records showing the status of said bookmaking business and showing the amount of money owed to winning bettors and the amount of money to be collected from losing bettors, large quantities of 'flash paper' being inflammable paper which can be instantly ignited so as to destroy any records of the commission of said offense, and large sums of money representing wagers collected from bettors on said professional and college football games." The search warrant itself incorporates this description by reference in the following

words: "records, money and other bookmaking paraphernalia described in the attached affidavit."

Respondent invites this Court to compare the foregoing description of the property to be searched for with the following descriptions of similar property in Federal affidavits and search warrants, which have been held to sufficiently describe the gambling paraphernalia:

United States v. *Clancy,* (CA 7, 1960), 276 F. 2d. 617; rev. on other grounds, 365 U. S. 312: ". . . divers records, to-wit books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons . . . and divers other tools, instruments, apparatus, United States currency and records . . ."

Merritt v. *United States,* (CA 6, 1957), 249 F. 2d. 19: "Lottery tickets and other paraphernalia which will indicate a numbers operation is being conducted on the premises."

Clay v. *United States,* (CA 5, 1957), 246 F. 2d. 298, cert. den. 355 U.S. 863: "Books, records, papers, documents and memorandum relating to the business of accepting wagers by a person or persons."

Nuckols v. *United States,* (D. C. Cir. 1938), 99 Fed. 2d. 353, cert. den. (Sub Nom): *Floratos* v. *United States,* 305 U.S. 626: "Gaming tables, gambling devices, racehorse slips and gambling paraphernalia used in violation of Sec. 865."

Even a cursory reading of the description of the property to be searched for and seized as set out in the State Court affidavit and search warrant shows clearly that the description is more detailed and specific in the present case than those in any of these four Federal cases. In the *Nuckols* case, supra, the Circuit Court of Appeals for the District of Columbia stated, "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods."

It is, therefore, quite clear that the affidavit and search warrant in this case were not "general" as contended by Petitioners, but the descriptions were quite specific.

NO SUBSTANTIAL FEDERAL QUESTION IN ADMITTING LINE SHEET

In his application for certiorari, petitioner seeks to raise such trial questions as admissibility of a "line sheet" seized among the other papers and records of the gambling house operators. No federal question is involved, for the reasons aforementioned, and also for the reason, that this would be included among the "instrumentalities" by which the illegal business was carried on. While it was reasonably included in the description of the gambling paraphernalia furnished the magistrate by the affidavit for the search warrant (see above), the universal rule is that officers executing a valid search may seize objects not named in the search warrant, even when they are the subject matter of an entirely different crime. *Johnson* v. *United States,* (CA DC, 1961) 293 F. 2d. 539. *Palmer* v. *United States,* (1953), 203 F. 2d. 66. *Harris* v. *United States,* 331 U.S. 145, 67 S. Ct. 1098. In the *Palmer* case, supra, it was stated, "But it is well established that given a lawful search some things may be seized in connection therewith which are not described

in the warrant." In the present case the "line sheet" was seized in connection with the same offense and was the same type of instrumentality of the crime as were those specifically described in the affidavit and search warrant. There was certainly no error in allowing the line sheet in evidence, and no federal question is involved.

STANFORD v. TEXAS distinguished

Petitioner, in his application for certiorari, cites and relies on *Stanford* v. *Texas,* 379 U.S. 476, 85 S. Ct. 506. In fact, it seems to be the only case which he cites in support of his petition. That case is distinguished from the present case in at least two very definite ways: *First,* it was a certiorari from the highest state court in Texas to which applicant could appeal on the question involved (page 480), and the applicant had asserted in that court several federal constitutional claims which had been denied, furnishing a proper basis for an appeal to the Federal court, in contrast with the case now at bar. *Second,* the things ordered to be seized by the search warrant were books and other written instruments of the state Communist Party, and it was pointed out that these books and papers were ordered seized because of the "ideas" they contained, thus clashing with the principle of freedom of speech and freedom of the press. No such principle is involved in the present case, in which the "books" were not ordered seized for any "ideas" contained therein, but were "books" in the sense of records and accounts and were ordered seized as instrumentalities of committing the offense of operating the gambling house. On page 485 the Stanford decision discussed the principle of freedom of speech and press there involved, and said:

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are *books,* and the basis for their seizure is the *ideas* which they contain. (cit.) No less a standard could be faithful to the First Amendment freedoms."

A footnote to the above extract cited *Marron* v. *U. S.*, 275 U.S. 192, 198-199, 48 S. Ct. 75, 76-77, as pointing out that a "book" which is no more than a ledger of an unlawful enterprise might thus stand on a quite different constitutional footing from the books involved in the Stanford case.

In this connection see *Landau* v. *U. S. Attorney*, 82 F. 2d 285 (2), (2 CA, 1936) cert. den. 298 U.S. 665. *Foley* v. *U. S.*, 64 F. 2d 1 (7) (5 CA, 1933) cert. den. 289 U.S. 762. *Bennett* v. *U. S.*, 145 F. 2d 270, (4 CA, 1944). These additional cases illustrate the principle that "books" in the sense of records of an illegal enterprise come within the category of instrumentalities of crime and are therefore subject to seizure as such without violating the constitutional principles which seizure of books containing ideas would involve.

PROBABLE CAUSE SUFFICIENTLY SHOWN

An additional contention now made by petitioner is that the search warrant should be held void by the United States Supreme Court because it didn't use the words "probable cause." The warrant said: "For sufficient cause made known to me, you are commanded . . ." The facts stated in the affidavit accompanying the war-

rant are ample to authorize the finding of probable cause. There is no special magic in the words "probable cause." The words used in the warrant are sufficient to show that the magistrate determined that there was probable cause for issuing it. The facts and recitals measure up to all the requirements pointed out in *Ker* v. *California,* 374 U.S. 23, 34-35; 83 S. Ct. 1623, 1630. That case set forth and discussed the facts relied upon to establish "probable cause" and then instead of saying that "probable cause" had been shown the Opinion stated that the facts pointed out "clearly furnished grounds for a *reasonable belief* that petitioner George Ker had committed and was committing the offense . . ." In *34 Words & Phrases* (perm. ed.) pages 22 to 32, several dozen cases are pointed out from state and Federal courts referring to the meaning of the words "probable cause" in the issuance of search warrants, most of them saying that "reasonable grounds for belief" are equivalent words. One of the cases is *Dandrea* v. *United States,* 7 F. 2d 861, 864, which gives the following as a quotation from *Stacey* v. *Emery,* 97 U.S. 642:

> "Probable cause has been defined by this court as 'reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.'"

CONCLUSION

For the foregoing reasons, Respondent urges this Court to decline to issue the writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Walter LeCraw, of counsel for the State of Georgia, Respondent in the foregoing case, certify that I have this day served the foregoing brief of Respondent upon opposing counsel by mailing a copy of same to Hon. Wesley R. Asinof, counsel for the petitioner, at his office, 419 Atlanta National Building, Atlanta, Ga. 30303.

This November 10, 1966.

J. WALTER LECRAW,
Assistant Solicitor General
Atlanta Judicial Circuit